

STATE OF MICHIGAN
COURT OF APPEALS

AYESHA HAQUE, Personal Representative of the
Estate of SAZZADUL HAQUE, Deceased,

UNPUBLISHED
January 20, 2005

Plaintiff-Appellant/Cross-Appellee,

v

WILLIAM BEAUMONT HOSPITAL,

No. 250128
Oakland Circuit Court
LC No. 1997-000541-NH

Defendant-Appellee/Cross-
Appellant.

Before: Talbot, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Plaintiff filed this medical malpractice action after her husband, Sazzadul Haque (hereinafter "the decedent"), died after undergoing angioplasty and emergency bypass surgery. At the conclusion of a jury trial, a verdict was rendered in favor of defendant. Thereafter, plaintiff's motions for judgment notwithstanding the verdict (JNOV) or a new trial were denied by the trial court. Plaintiff now appeals as of right, and we affirm.

The decedent was first treated for coronary artery disease in 1995 when he was forty-three years old. Defendant's doctors initially performed angioplasty to clear a blocked artery in March 1995. Later, follow-up angioplasty procedures were performed in April 1995. The first one was successful, but complications arose during the second procedure. The decedent went into shock, possibly because one of his arteries was occluded. The treating doctor decided to continue with the procedure instead of immediately sending the decedent for emergency bypass surgery. An artery also had been dissected during the procedure, which needed to be repaired. After the artery was cleared and the dissection treated, the decedent developed further complications a few hours later that required emergency bypass surgery. The decedent died five days following surgery, apparently from a cardiac arrest. An autopsy was never performed, so the exact cause of decedent's death was unknown.

Plaintiff's theory of malpractice was that the decedent's doctors breached the standard of care by electing to first perform angioplasty on the decedent, rather than bypass surgery, because of the decedent's condition. The defense theory was that the decedent was not a good candidate for bypass surgery as a first treatment option, and, therefore, it was appropriate to first attempt to treat his condition through angioplasty, which is a less invasive procedure.

I

First, plaintiff argues that the trial court erred in setting aside a default entered against defendant for not timely filing its answer. A ruling on a motion to set aside a default or a default judgment is entrusted to the trial court's discretion. "Unless there has been a clear abuse of discretion, a trial court's ruling will not be set aside." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

MCR 2.603(D) governs motions to set aside a default or a default judgment. Except in circumstances involving a lack of jurisdiction, such a motion shall be granted only upon a showing of good cause and an affidavit of facts demonstrating that there is a meritorious defense. MCR 2.603(D)(1); *Alken-Ziegler, Inc, supra* at 233. While it is the policy of this state not to set aside defaults and default judgments that have been properly entered, appellate courts must generally defer to the trial court's exercise of discretion in such matters. *Id.* at 228-229. See also *AMCO Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94-95; 666 NW2d 623 (2003).

Initially, we agree with the trial court that, for purposes of a motion to set aside a default, defendant was only obligated to submit an affidavit that complied with MCR 2.603(D)(1). Although MCL 600.2912e(1) also requires a defendant in a medical malpractice action to file an affidavit of meritorious defense, that statute is not applicable to a motion to set aside a default, and the requirements of MCL 600.2912e are distinct from, and not a part of, MCR 2.603(D)(1). As the trial court noted, the sufficiency of defendant's affidavit under MCL 600.2912e is properly a matter to be argued in a motion for summary disposition. Under MCR 2.603(D)(1), defendant was only required to file a single affidavit of facts showing that it had a meritorious defense in this matter.

Next, plaintiff argues that defendant failed to satisfy the "good cause" requirement of MCR 2.603(D)(1). We disagree. To show "good cause," a party may establish "(1) a substantial irregularity or defect in the proceeding upon which the default is based," or "(2) a reasonable excuse for failure to comply with the requirements that created the default." *Alken-Ziegler, Inc, supra* at 233-234.

Defendant asserts that, due to various procedural delays in this matter, it inadvertently failed to file its answer in a timely manner. The record discloses that plaintiff filed this action in 1997, but, because of several preliminary issues regarding plaintiff's own affidavit of merit, and delays in securing plaintiff's appointment as personal representative of the decedent's estate,¹ defendant's answer was not due until March 2001. The default was entered against defendant approximately one month later. Earlier, however, in January 2001, defendant had filed its affidavit of meritorious defense as required by MCL 600.2912e, thereby signifying its intent to defend this action. Under the circumstances, the trial court did not abuse its discretion in determining that there was a reasonable excuse for defendant's failure to timely file its answer.

¹ See *In re Haque Estate*, 237 Mich App 295; 602 NW2d 622 (1999).

Moreover, we find no merit in plaintiff's argument that the default should not have been set aside because one of the defense theories presented at trial—that the decedent's arteries were too small to make him a good candidate for bypass surgery—was not included in defendant's affidavit of meritorious defense submitted in support of defendant's motion to set aside the default. As previously noted, MCR 2.603(D)(1) only required that defendant demonstrate by affidavit that it had a meritorious defense. Whether additional facts in support of the defense were presented at trial for the first time has no bearing on the trial court's decision to set aside the default.

II

Plaintiff alternatively argues that she is entitled to JNOV or a new trial because the defense claim that the decedent was not a good candidate for bypass surgery due to his small veins was not disclosed in the affidavit of merit filed under MCL 600.2912e. Again, we disagree.

This Court reviews a motion for JNOV by reviewing the evidence and all legitimate inferences in the light most favorable to the nonmoving party. The motion should be granted only where the evidence, when so viewed, fails to establish a claim as a matter of law. *Orzel v Scott Drug Co*, 449 Mich 550, 557-558; 537 NW2d 208 (1995). If reasonable jurors honestly could have reached different conclusions based upon the evidence, neither the trial court nor this Court may substitute its judgment for that of the jury. *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995). A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). However, any questions of law that may arise are reviewed de novo. *Id.*

Plaintiff cites no authority for the proposition that an affidavit of merit controls the scope of the evidence that a defendant may later present at trial, and no such limitations are provided for in MCL 600.2912e. This Court has held that even a defendant's failure to file an affidavit of meritorious defense does not preclude a trial court from allowing the defendant to present a defense. *Wilhelm v Mustafa*, 243 Mich App 478, 485; 624 NW2d 435 (2000). Furthermore, although MCL 600.2912e(1)(a) requires a defendant to state a factual basis for each defense to the claims against it, a detailed statement is not required because the affidavit of merit must be filed before discovery is completed; at this stage of the proceedings, it would be impractical and unrealistic to require the parties to set forth in explicit detail all of the relevant facts that support their claims.

In any event, the record does not support plaintiff's claim that the evidence regarding the decedent's artery size was a new defense that previously had not been disclosed by defendant in its affidavit of merit. Defendant consistently claimed as its defense that the decedent was not a suitable candidate for coronary bypass surgery and that angioplasty was the appropriate first treatment option under the applicable standard of care, principally because of the decedent's young age and the risks associated with the surgery. At trial, defendant further explained that the decedent's arteries were small, which was another factor against bypass surgery as a first treatment option. The size of the decedent's arteries was simply one factor that weighed against bypass surgery, like his age and the relative risks of each procedure, and, thus, such evidence did not constitute a separate or new defense theory.

We conclude that the trial court did not otherwise err in denying plaintiff's motions for a new trial or judgment notwithstanding the verdict. Even viewing the evidence in the light most favorable to plaintiff, reasonable minds could not differ in concluding that bypass surgery was not the only appropriate treatment option for the decedent's condition. The evidence produced at trial did not demonstrate that angioplasty was an improper procedure to use in this case based upon multiple factors. Furthermore, plaintiff failed to show that the decedent died as a result of defendant's malpractice in conducting the angioplasty. For these reasons, the trial court did not err in denying plaintiff's motions.

III

Plaintiff also argues that the trial court abused its discretion when it refused to allow her and the decedent's brother to testify regarding hearsay statements that Dr. Joseph Bassett made after the decedent underwent bypass surgery. This Court reviews a trial court's decision to exclude evidence for an abuse of discretion. *Shuler v Michigan Physicians Mutual Liability Co*, 260 Mich App 492, 508; 679 NW2d 106 (2004). A trial court's decision on a close evidentiary issue is ordinarily not an abuse of discretion. *Id.* at 509.

According to plaintiff, after Dr. Bassett completed the operation on the decedent, he told plaintiff that the decedent "came too late and otherwise, he could have walked out of here on the third day." At the time, plaintiff believed that Dr. Bassett was upset. The decedent's brother, who is also a cardiologist, testified that Dr. Bassett asked him, "Why did you allow this to happen?" The decedent's brother also believed that Dr. Bassett was upset when he made the statement. Plaintiff's attorney argued that Dr. Bassett's statements – purportedly an admission that the decedent came to him too late for surgery and that if the bypass had been done before the other procedures, the decedent would have walked out of the hospital in three days – qualified for admission under MRE 803(2) as excited utterances. Defendant objected, arguing that the statements were hearsay. The trial court concluded that the statements were vague and ambiguous, and more prejudicial than probative, and, therefore, excluded the statements under MRE 403.

We conclude that the trial court did not abuse its discretion in barring the statements under the circumstances. Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Waknin v Chamberlain*, 467 Mich 329, 334; 653 NW2d 176 (2002). Evidence is not unfairly prejudicial unless it threatens the fundamental goals of accuracy and fairness. The danger is that a jury will decide that the evidence is more probative of a fact than it actually is. *Id.* at 334-335 n 3. The trial court accurately assessed that the statements were subject to too many possible interpretations, thereby lessening the probative value of the statements and unduly increasing the potential for unfair prejudice. In the least, this issue involves a close evidentiary question. Therefore, we conclude that the trial court did not abuse its discretion by excluding the statements. *Shuler, supra*. In light of this disposition, it is unnecessary to address defendant's issue on cross appeal.

Affirmed.

/s/ Michael J. Talbot
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder